

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

Affidavit

6/8

77-6006

To be argued by
STUART I. PARKER

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United States Court of Appeals FOR THE SECOND CIRCUIT

Docket No. 77-6006

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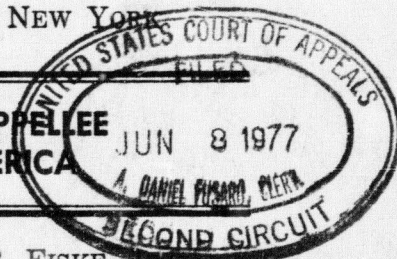
MARY COX, as Administratrix of the Goods, Chattels
and Credits of Bobby Cox, deceased,
Plaintiff-Appellant,
—against—

ADMINISTRATOR OF THE VETERANS ADMINIS-
TRATION, VETERANS ADMINISTRATION, UNITED
STATES OF AMERICA,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

**BRIEF FOR DEFENDANT-APPELLEE
UNITED STATES OF AMERICA**



ROBERT B. FISKE, JR.,
*United States Attorney for the
Southern District of New York,
Attorney for Defendant-Appellee.*

STUART I. PARKER,
PATRICK H. BARTH,
*Assistant United States Attorneys,
Of Counsel.*

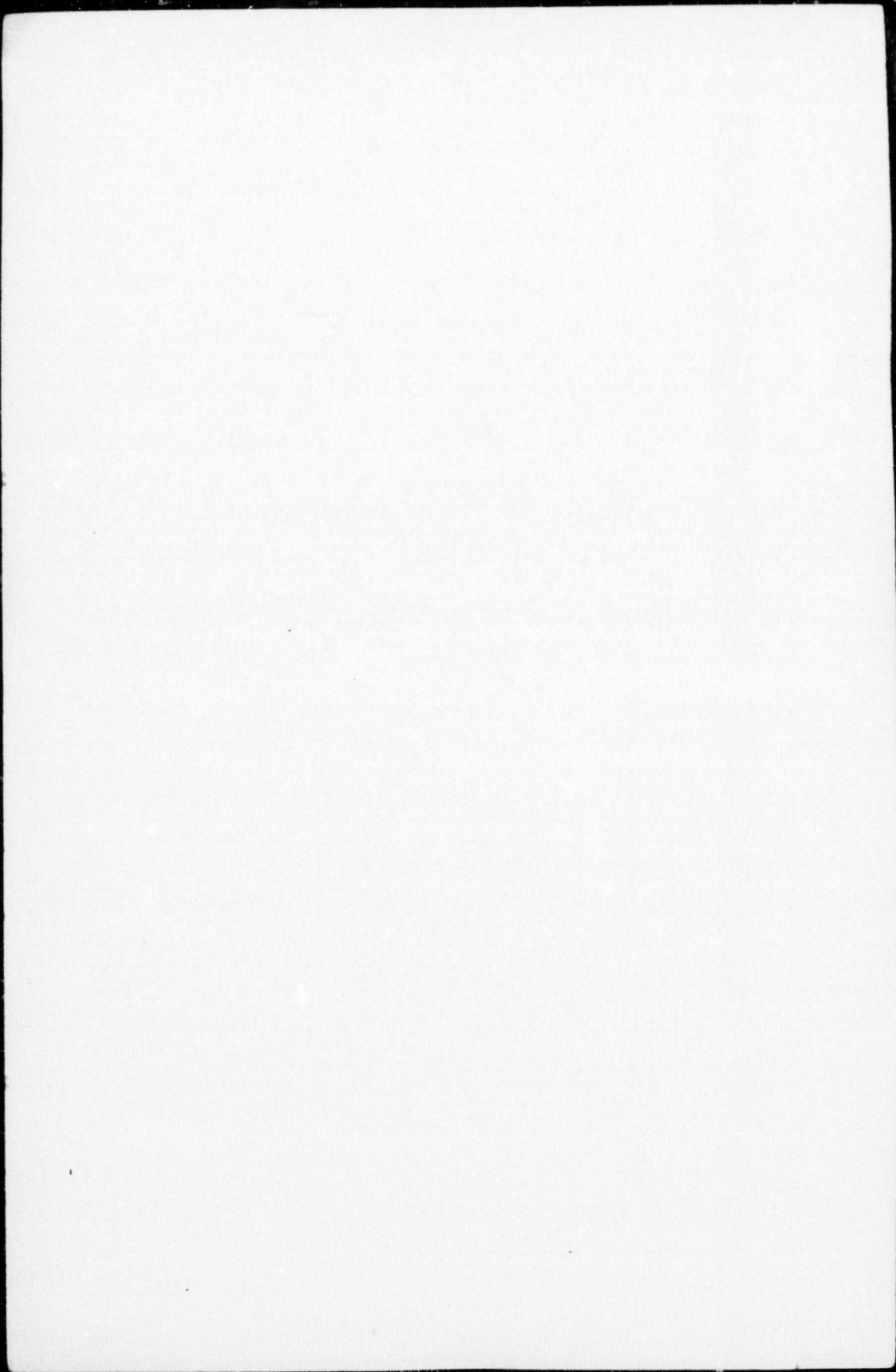


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ADMINISTRATOR OF THE VETERANS ADMINISTRATION,
VETERANS ADMINISTRATION, UNITED STATES OF
AMERICA,
Defendants-Appellees.

BRIEF FOR DEFENDANT-APPELLEE

UNITED STATES OF AMERICA

Preliminary Statement

The plaintiff-appellant appeals from a Judgment, entered December 21, 1976, denying plaintiff's claims for relief and dismissing the complaint. The case was tried to the Honorable Edward Weinfeld, United States District Judge for the Southern District of New York on December 9, 10 and 20, 1976. The District Court rendered its findings of fact and conclusions of law in open court at the conclusion of the trial. The findings of fact and conclusions of law are reprinted in the Appendix at 19A through 26A. This appeal was timely commenced on January 3, 1977.

This is a wrongful death action against the United States brought pursuant to the provisions of the Federal Tort Claims Act, 28 U.S.C. §§ 2671 *et seq.** Jurisdiction is premised on 28 U.S.C. § 1346(b). Plaintiff-appellant, Mary Cox McNeil, is the administratrix of the estate of Bobby Cox, her brother, who committed suicide on October 12, 1972 in North Carolina.** Mrs. McNeil claimed that her brother's suicide was proximately caused by the negligence of Veterans Administration Hospitals in New York City and Fayetteville, North Carolina. She alleged that both hospitals were negligent in permitting Mr. Cox, a psychiatric patient, to discharge himself against medical advice in late August 1972 and that the Veterans Administration Hospital in New York City was negligent in refusing him readmission on September 20, 1972.

At the trial of this action the District Court was presented with the live testimony of five witnesses. In addition several exhibits, including the complete hospital records of the decedent, were entered into evidence. After evaluating the evidence, the District Court dismissed the complaint. The essence of the District Court's findings is twofold. One, the Court found that plaintiff failed to prove that the discharges against medical advice of Cox from the Veterans Administration Hospitals in New York City on August 14, 1972 and Fayetteville, North Carolina on August 21, 1972 constituted negligence or caused his death by suicide on October 12, 1972. Two, the Court found that Cox never sought readmission to the

* The Veterans Administration and its administrator were named as defendants in the complaint. In the Pre-Trial Order, the pleadings were amended to delete the Administrator of the Veterans Administration and the Veterans Administration as defendants.

** Mrs. McNeil commenced this action under her maiden name, Cox. The caption was not changed to reflect her married name. We shall refer to her throughout this brief as Mrs. McNeil.

Veterans Administration Hospital on September 20, 1972. In so finding, Judge Weinfeld specifically rejected the only testimony presented by plaintiff in advance of that allegation.

Issue Presented

On this appeal, the plaintiff presents the Court with a myriad of cases from various jurisdictions which have no bearing on the one issue raised: Were Judge Weinfeld's findings that plaintiff failed to prove negligence and that Cox did not seek readmission at the New York City Veterans Administration on September 20, 1972 clearly erroneous?

Statement of Facts

Two findings are challenged on this appeal: first, that plaintiff failed to prove the Veterans Administration was negligent in allowing Cox to discharge himself against medical advice from the New York City and Fayetteville, North Carolina Veterans Administration Hospitals; second, that Cox did not seek admission to the New York City Hospital on September 20, 1972. In regard to the negligence findings, plaintiff does not challenge the Court's recitation of the facts concerning events preceding Cox's discharge against medical advice from the Fayetteville, North Carolina Veterans Administration Hospital. Rather, plaintiff takes issue with the conclusions drawn from those facts by the psychiatric experts. In regard to the finding that Cox did not seek admission to the New York City Veterans Hospital on September 20, 1972, plaintiff contends that the Court erred in refusing to credit her testimony.

In this statement of facts, we will first set out the findings of the Court which are not contested; next we

will review the expert psychiatric testimony; and last we will review the evidence concerning Cox's alleged attempt to seek readmission to the New York City Veterans Administration Hospital.

A. The Uncontested Facts

The history of Mr. Cox's troubled life preceding his last hospital discharge is uncontested and was summarized by Judge Weinfeld as follows:

Cox served in the Army from 1965 to 1967. After his discharge, he returned to live with his mother in North Carolina. According to his mother, he became restless and depressed and could not sleep. On September 20, 1968, while he was living in New Jersey, he was brought to the Veterans Administration Hospital in New York City by his sister, the plaintiff. He was diagnosed as undergoing a schizophrenic reaction, acute, undifferentiated type. He was depressed, heard voices, and was afraid people were out to get him.

During his stay at the hospital, he tried repeatedly to leave without permission and on two occasions tried to escape through windows, although his ward was on the 16th floor.

Following these incidents, he underwent a course of shock therapy, which greatly improved his condition. He was released on February 20, 1969, at which time the attending doctor noted that he was "medically competent and able to resume some employment."

Subsequently, on March 2, 1970, Cox was again brought to the New York Veterans Administration Hospital in a "nervous and depressed" condition.

However, there was no indication that he was violent at that time and one doctor specifically noted that Cox was not suicidal. As on his first stay, he made several efforts to leave the hospital. However, he improved rapidly and was released on March 30th. After this hospitalization, Cox obtained employment with the Post Office and lived with his sister, the plaintiff, in Queens.

In July 1972 Cox became depressed and began hearing voices again and quit his job. His sister brought him back to the Veterans Administration Hospital on July 14. He was admitted on July 19. The sister testified that she never heard him threaten to harm himself or her and that the only violent act he committed was ripping a telephone out of a wall. Upon his admission, an examining doctor noted that he had neither suicidal nor homicidal tendencies. As on prior admissions, he occasionally tried to leave the hospital. Although he continued to hear voices and remained tense and depressed, he did not appear to be as seriously ill as on his previous admissions. On several occasions, he was allowed to leave the hospital with his sister on passes. On August 14, 1972, after returning late from one of those visits, he insisted upon leaving the hospital and finally was allowed to leave against medical advice after signing a statement that he understood he could not be readmitted for ninety days.

Several days later he went to North Carolina to be with his mother. His depression and hallucinations continued and on August 20 his mother brought him to the Veterans Administration Hospital in Fayetteville, North Carolina. Although the mother testified she told the admitting doctor Cox was acting violent, the hospital records are to

the contrary. The record indicates "Mother said he doesn't want to work, thinks he has no friends. She didn't think he has hallucinations, however, and is not violent, but wants to be going to someplace all the time." The next day Cox insisted upon leaving the hospital and signed out against medical advice. (20-23A).*

B. The Expert Psychiatric Testimony

The Government called Dr. Martin Kesselman, a board certified psychiatrist, as its expert witness. Dr. Kesselman testified that there was nothing in Cox's hospital record which led him to believe that the physicians at the New York City and Fayetteville Veterans Administration Hospitals should have anticipated that Cox was in imminent danger of committing suicide when he was discharged from those hospitals against medical advice (149A). Dr. Kesselman also was of the opinion that the decision at each hospital to permit Cox to be discharged against medical advice was reasonable in light of accepted medical practices (145-148A). He further testified that even if Cox had been refused admission to the New York City Hospital on September 20, 1972, it would be impossible to state with medical certainty that Cox's suicide was causally related to the alleged refusal to admit him. In this connection, Dr. Kesselman testified:

* The Fayetteville Veterans Administration Hospital record, including the admission note quoted by Judge Weinfeld, is at pages 240A through 245A of the Appendix. As noted on 240, 243 and 245A, Cox's mother assumed responsibility for the care and supervision of her son upon his discharge. Mrs. Cox testified that she was told at the Fayetteville Hospital that Cox needed further treatment (60-61A) and that she told a hospital staff member that she would take her son to the Veterans Administration Hospital in New York City for further treatment (60A).

We are dealing with a disease which fluctuates so intensely that to make—to assume that whatever suicidal impact or suicidal state of mind the patient was put into on account of being turned away, we would have to assume that it was sustained for three weeks without the family's having recourse to return to the hospital or any other facility (154A).

While Judge Weinfeld did not specifically discuss causation with respect to the alleged September 20, 1972 refusal to admit, the District Court did observe that:

[I]t is doubtful, to say the least, that plaintiff's discharges in August 1972 were causally related to or were the proximate cause of his suicide over seven weeks later, in the light of the expert testimony that schizophrenics often undergo wide mood swings (25A).

Plaintiff's expert, Dr. Ernest Kovacs, testified that he would have retained Cox in both the New York City and Fayetteville Hospitals against his will (217-218A), but noted that psychiatrists will differ "markedly" in determining whether to hold a patient against his will (231A). Dr. Kovacs agreed that the decision at both hospitals to allow Cox to sign out against medical advice was a judgment over which physicians could disagree and not a violation of accepted medical practice (229A, 231-236A).

In regard to the discharge from the New York City Veterans Administration Hospital, Dr. Kovacs testimony was as follows:

Q. I am limiting you to August 14 and I am talking about the discharge.

Would you, Doctor, say that it is more than a mistake? Specifically, did Dr. Singer . . .

violate accepted medical practices in discharging Cox, or is what we are talking about here a judgment call?

* * * * *

[Colloquy]

A. It was clearly a matter of judgment, I would say (232-233A).

In regard to the ⁵discharge from the Fayetteville Veterans Administration Hospital, Dr. Kovacs testified:

I would certainly say there was nothing flagrantly destructive about what they did. . . .

In all of these situations we are always talking about judgment (233-234A).

C. Cox's Alleged Attempt to Seek Readmission to the New York City Veterans Administration Hospital

Cox's mother testified that he stayed with her in North Carolina for approximately a week after signing out of the Fayetteville Veterans Administration Hospital on August 21, 1972 (63A). Thereafter, according to Mrs. Cox, her son drove to New York in his own automobile for the purpose of entering the New York City Veterans Administration Hospital (63-64A). Cox's sister testified that he arrived in New York on September 19, 1972, and that on September 20, 1972, she took him to the New York City Veterans Administration Hospital around 5:30 or 6:00 o'clock in the evening (80-81A).

Mrs. McNeil testified that a clerk refused her brother admission after checking his hospital records and learning that he had signed himself out of the hospital against

medical advice less than 90 days before (82A). She said the clerk told her it was against hospital rules for Cox to be readmitted within 90 days. According to Mrs. McNeil, her brother did not see a doctor on that day (82A).

On cross-examination, Mrs. McNeil testified that she did not remember the sex or color of the clerk who she claimed turned her brother away from the hospital (94-95A). Nor did she remember whether or not she called the hospital after September 20th to complain about the alleged refusal to admit her brother (97A). Mrs. McNeil did remember that she did not take her brother back to the New York City Veterans Administration Hospital after September 20, 1972 (97-98A). Instead, Mrs. McNeil testified that she and her brother went to the Veterans Administration Hospital in Brooklyn (99A) and the Naval Hospital in St. Altans (100A). Mrs. McNeil did not recall when these visits were made or whether her brother was seen by physicians (99-100A). However, she did recall that whomever she and Cox saw at both hospitals told them to go back to the New York City Veterans Administration Hospital (100-101A). Mrs. McNeil never claimed that Cox followed this advice.

As the District Court Judge recognized (24A), Mrs. McNeil's testimony concerning the alleged refusal to admit her brother to the Manhattan Veterans Administration Hospital could not be true unless there had been a total breakdown of the hospital's admitting and record keeping procedures. These procedures were testified to by Peter Pascarelli, Chief of the Hospital's Medical Administration Service, who in 1972 was responsible for supervising the hospital's admissions staff (102-103A).

Mr. Pascarelli testified that had a veteran, such as Cox, applied for readmission to the hospital on September 20, 1972 a medical certificate and a routing sheet would have been prepared by the admission's clerk prior to the

veteran's records being obtained from the record room and prior to his seeing a physician who would determine whether or not to admit him (103, 104, 136 and 137A). The routing sheet would have been destroyed after 90 days (138A), but the medical certificate would have become a permanent part of the veteran's hospital record (136A). Each applicant for admission to the hospital, including those who like Cox had earlier signed out against medical advice, would be examined by a physician, who alone would make the medical determination as to whether admission was warranted (103-108).*

The Manhattan Veterans Administration Hospital records for Cox, Plaintiff's Exhibit 1 in evidence, did not contain a medical certificate reflecting that he had sought admission to the hospital on September 20, 1972. The record does however contain medical certificates showing Cox's other appearances for admission at the hospital, including one showing that he was refused admission on November 8, 1971.

After reviewing the testimony of Mrs. McNeil concerning the events of September 20, 1972 and the testimony of Mr. Pascarelli regarding the hospital's admission procedures on that day, the District Court said:

In order to credit the plaintiff's testimony, the Court would have to believe that on this occasion the staff of the Veterans Administration Hospital failed to follow every step of the prescribed procedure. Based upon the demeanor of witnesses and all relevant evidence, the Court finds that plaintiff

* Mr. Pascarelli testified that in September, 1972 there was no hospital rule prohibiting readmission of irregularly discharged patients for a period of 90 days. He also testified that in earlier years when there had been such a rule the irregularly discharged patient would nevertheless be examined by a physician and admitted if emergency treatment were required (105-106A).

has failed to sustain her burden of proof that the decedent Cox, accompanied by her, sought admission to the Veterans Administration Hospital in New York City on September 20, 1972. In fact, regardless of who has the burden of proof on this issue, the Court finds upon all the evidence that the sister and the decedent did not seek admission to the hospital on that day (24A).

ARGUMENT

The District Court's Findings Of Fact Are Not Clearly Erroneous.

Rule 52(a) of the Federal Rules of Civil Procedure provides that "[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." A finding is "clearly erroneous" when:

"[A]lthough there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948).

In the instant case, Judge Weinfeld's findings are well supported by the record and are not "clearly erroneous."

Turning first to the finding that plaintiff failed to prove that it was negligent to discharge Cox against medical advice from the two Veterans Administration Hospitals, we need only point to the testimony of both psychiatrists that the discharges did not violate accepted medical practices (*supra*, pp. 6-8). In addition, there was no evidence that Cox's suicide was causally related to the discharges. Indeed, the testimony of Dr. Kesselman concerning the fluctuations in mood of schizophrenics strongly supports a finding to the contrary (151-154A).

The District Court also had a strong basis for finding that Cox did not return to the New York City Veterans Hospital on September 20, 1972. First, there was Mr. Pascarelli's testimony that pursuant to the routine practices of the hospital's admission staff had Cox applied for readmission on September 20, 1972, he would have been examined by a doctor prior to the obtaining of his medical record from the record room and a medical certificate reflecting his visit would have been placed in his hospital record. Second, there was no such medical certificate in Cox's hospital record. The following testimony by Mr. Pascarelli in response to Judge Weinfeld's questions provided a sufficient basis for the Court's concluding, under Rule 803(7) of the Federal Rules of Evidence,*

* Rule 803(7) states:

(7) *Absence of entry in records kept in accordance with the provisions of paragraph (6).* Evidence that a matter is not included in the memoranda reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack or trustworthiness.

Rule 803(6) of the Federal Rules of Evidence states:

(6) *Records of regularly conducted activity.* A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

that the absence of the medical certificate proved the non-occurrence of Cox's visit:

EXAMINATION BY THE COURT:

Q. If a veteran had appeared on September 20, 1972 and applied for readmission, would any record be made of that?

A. Yes, sir.

Q. What record would be made?

A. We would make out a routing sheet, which is our count that we maintained for our cost and also the 10M, the medical certificate, which would be forwarded to the physician to make his evaluation of the patient. In the interim we would call for his record. The 10M would then be placed in his record.

Q. What is the 10M?

A. The 10M is the medical certificate on the examination. There is a copy in the record right now for his '72 admission.

Q. Would that be made out automatically?

A. That is made out automatically.

Q. Without regard to subsequent events?

A. Right.

Q. The minute the veteran appears——

A. It is made out.

Q. A clerk or an administrative assistant makes out this form?

A. Right.

Q. Would there be any circumstance in which a clerk would not make out the form?

A. Anything is possible, but I doubt it. We make them out, your Honor, where—you know, we get chronic alcoholics come into our institution, especially on the off hours. When I come in in the morning I read my reports and I walk out and I go look at the application and my clerk will write on the medical certificate the patient did not wait for examination and the physician will put the time that he called him and sign it so that we keep these in the file just in case something does happen. This is a recurring thing.

Q. You say the normal practice is whoever appears——

A. We make it out.

Q. You don't know and the clerk doesn't know whether the individual is a veteran or non-veteran, that form is still made out.

A. We ask if he is a veteran and we make it out. If he is non-veteran, no matter what time, and he is having problems, we let the physician make a decision whether he can walk up to Bellevue, NYU, or whether we should give him emergency treatment and then move him, but we do maintain these records (136-138A).*

See Rule 406 of the Federal Rules of Evidence.

Moreover, there was good reason independent of Mr. Pascarelli's testimony and the absence of the medical certificate to reject Mrs. McNeil's testimony. Her recollection of events was highly selective. She did not recall the color or sex of the clerk who turned her brother away and did not even remember whether she had called up the

* Mr. Pascarelli also testified that the routing slip would be destroyed after 90 days (138A). Thus only the medical certificate would become a permanent part of the hospital record.

hospital to complain about the clerk's behavior. In addition, the trial judge had the opportunity to observe Mrs. McNeil's demeanor and otherwise weigh her credibility in light of her interest in the outcome of the litigation and the internal consistency of her testimony.

Plaintiff, ignoring all of the factors which the court may consider in evaluating credibility, argues that her testimony was uncontroverted and, therefore, the District Court was bound to credit it. This argument ignores that Mrs. McNeil's testimony was contradicted by the testimony of the hospital's routine procedures and the absence of a medical certificate for September 20, 1972. In addition, the argument fails to take into account the well settled rule that it is not "clearly erroneous" to refuse to credit the uncorroborated testimony of an interested party. *Guzman v. Pichirilo*, 369 U.S. 698, 702-703 (1962); *Mayer v. Zim Israel Navigation Co.*, 289 F.2d 562, 563 (2d Cir. 1961); *Broadcast Music, Inc. v. Havana Madrid Restaurant Corp.*, 175 F.2d 77, 80 (2d Cir. 1949).

In view of the foregoing, we submit there is simply no basis for overturning the District Court's findings as "clearly erroneous."

CONCLUSION

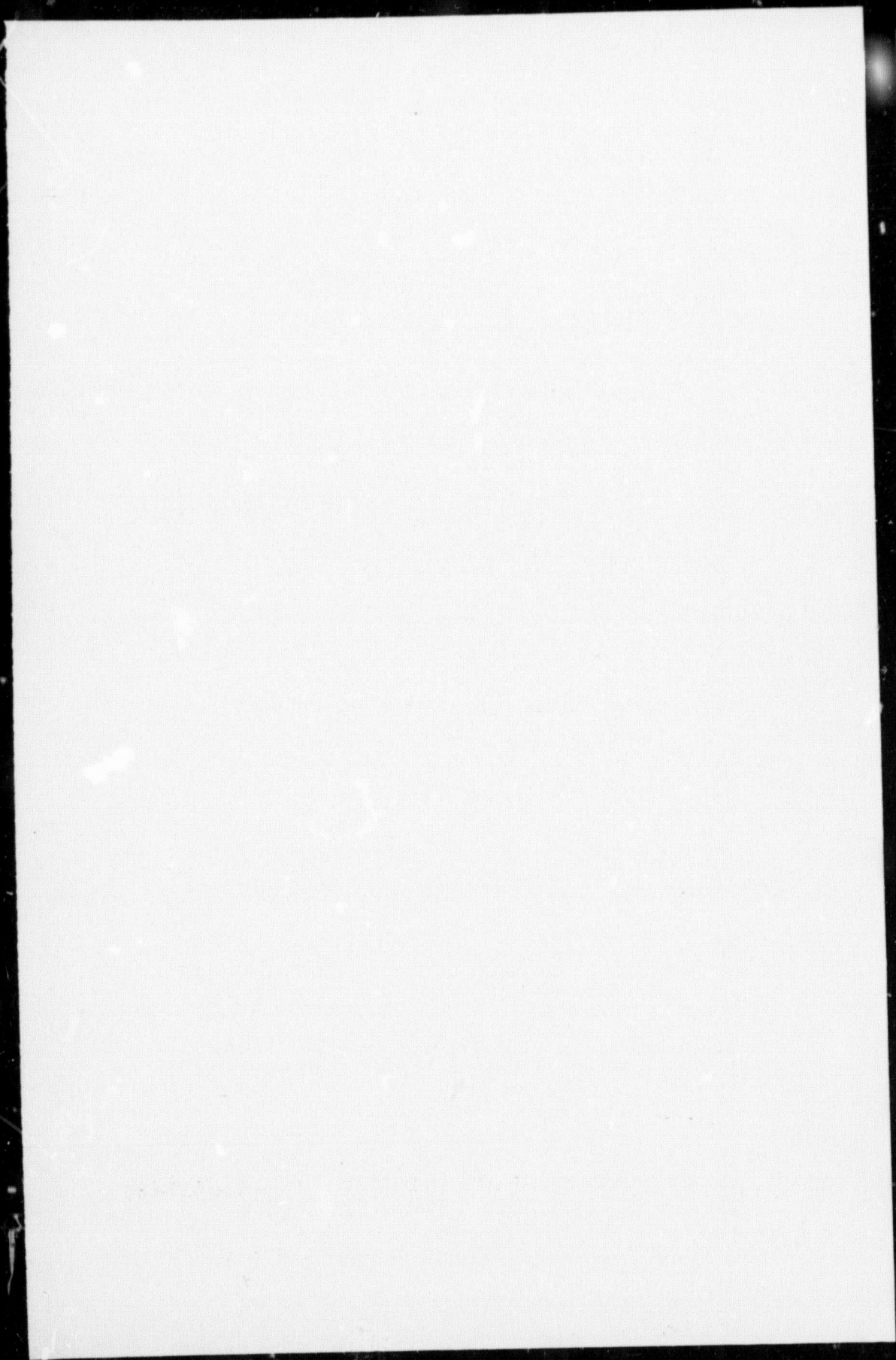
For the foregoing reasons, the judgment of the District Court should be affirmed.

Dated: New York, New York
June 6, 1977

Respectfully submitted,

ROBERT B. FISKE, JR.,
*United States Attorney for the
Southern District of New York,
Attorney for Defendant-Appellee.*

STUART I. PARKER,
PATRICK H. BARTH,
*Assistant United States Attorneys,
Of Counsel.*



AFFIDAVIT OF MAILING

State of New York)
County of New York) ss

Marian J. Bryant being duly sworn,
deposes and says that she is employed in the Office of the
United States Attorney for the Southern District of New York.

That on the
two copies
8th day of June 1977 she served ~~a copy~~ of the
within Brief for Defendant-Appellee United States of America

by placing the same in a properly postpaid franked envelope addressed:

Gerald Murray, Esquire
90-61 Sutphin Boulevard
Jamaica, New York 11435

And deponent further says s he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse Annex, One St. Andrews Plaza, Borough of Manhattan, City of New York.

Sworn to before me this

Marian L. Bryant

8th day of June, 19 77

Pauline P. Troia
PAULINE P. TROIA
 Notary Public, State of New York
 No. 31-4632381
 Qualified in New York County
 Commission Expires March 30, 1978